FILED BY CLERK
SEP 26 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee/Respondent, v. GILBERT ACOSTA, Appellant/Petitioner.	2 CA-CR 2010-0341 2 CA-CR 2010-0368-PR (Consolidated) DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL AND PETITION FOR REVIEW
FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20064210

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED
REVIEW GRANTED; RELIEF DENIED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, appellant Gilbert Acosta was convicted of numerous felonies including possession of a deadly weapon by a prohibited possessor. The trial court found Acosta had two historical prior felony convictions and sentenced him to a combination of consecutive and concurrent, presumptive prison terms totaling 29.5 years. This court affirmed Acosta's convictions and sentences on appeal. *State v. Acosta*, No. 2 CA-CR 2007-0194 (memorandum decision filed Jan. 6, 2009).

¶2 Acosta then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., arguing the prohibited-possessor conviction should be vacated because it was not supported by sufficient evidence and there was insufficient, admissible evidence that he had historical prior felony convictions for sentence enhancement purposes. Acosta further argued his trial counsel had been ineffective because he had failed to seek a judgment of acquittal on the prohibited-possessor charge and had failed to challenge the sufficiency of the evidence to establish the historical prior felony convictions. He also claimed appellate counsel similarly was ineffective "in failing to raise these issues on appeal."

¶3 After hearing argument, the trial court found all but the claims of ineffective assistance of trial counsel precluded because Acosta had failed to raise them on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3). After oral argument, the court found that although trial counsel had not been ineffective at trial, he had been ineffective in failing to challenge the sufficiency of the evidence to establish Acosta's prior convictions at the prior-convictions trial. The court vacated Acosta's sentences and set a new trial on the allegation of historical prior felony convictions. At the conclusion of that trial, the court

found Acosta had two historical prior felony convictions for sentence enhancement purposes. The court resentenced him to concurrent, presumptive prison terms on each count, the longest of which was 15.75 years.

¶4 Acosta now appeals from the sentences imposed and petitions this court for review of the trial court's denial of post-conviction relief. We have consolidated the appeal with the petition for review. For the reasons set forth below, we affirm Acosta's convictions and sentences and, although we grant review of the trial court's dismissal of his Rule 32 petition, we deny relief.

Appeal

¶5 Acosta first contends the state failed to sustain its burden of proving his conviction in Pima County cause number CR-20011874 was a valid historical prior conviction for sentence enhancement purposes. He argues he had committed the underlying offense in CR-20011874 more than five years before his current offenses and thus, "on its face," that conviction does not constitute a valid historical prior conviction under A.R.S. § 13-604(W)(2)(c).[1]

[1]Under the statute,

> 2. "Historical prior felony conviction" means:
>
> . . . .
>
> (c) Any class 4, 5 or 6 felony, except the offenses listed in subdivision (a) of this paragraph, that was committed within five years immediately preceding the date of the present offense. Any time spent on absconder status while on probation or incarcerated is excluded in calculating if the offense was committed within the preceding five years. If a

¶6 "The proper procedure to establish a prior conviction is for the state to offer in evidence a certified copy of the conviction and establish the defendant as the person to whom the document refers." *State v. Hauss*, 140 Ariz. 230, 231, 681 P.2d 382, 383 (1984); *State v. Lee*, 114 Ariz. 101, 105-06, 559 P.2d 657, 661-62 (1976). And the state must prove prior convictions for sentence enhancement purposes with clear and convincing evidence. *State v. Cons*, 208 Ariz. 409, ¶ 15, 94 P.3d 609, 615 (App. 2004). "The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of discretion." *State v. Bigger*, 227 Ariz. 196, ¶ 42, 254 P.3d 1142, 1154 (App. 2011), *quoting State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990).

¶7 At the prior-convictions trial, the state presented as evidence a certified copy of Acosta's conviction in CR-20011874. The state also presented a certified copy of a court minute entry dated May 10, 2006, which stated the trial court had revoked Acosta's probation in that cause number and had sentenced him to the Pima County Adult Detention Center for a period of 365 days with credit for 269 days served.[2]

¶8 Acosta acknowledges that under § 13-604(W)(2)(c), any time spent in custody or on absconder status is excluded in determining whether the offense was

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> court determines a person was not on absconder status while on probation that time is not excluded.

2005 Ariz. Sess. Laws, ch. 188, § 1.

[2]In addition, Acosta's former probation officer testified at the trial on prior convictions that she had "[n]o doubt" that the Gilbert Acosta in court that day was the same Gilbert Acosta she had supervised on felony probation in 2001.

committed within the preceding five years. But Acosta argues on appeal, as he did below, that the state relied on inadmissible hearsay—a probation officer's testimony and a disposition minute entry—to establish that he had spent 269 days in custody, thus bringing CR-20011874 within the five-year period for purposes of determining whether it is an historical prior conviction for the purpose of sentence enhancement. We disagree.

¶9 The certified copies of court records offered by the state are public records and thus admissible under the public records exception to the hearsay rule. Ariz. R. Evid. 803(8) (records of public offices or agencies concerning matters observed pursuant to duty imposed by law and for which there was duty to report not excluded by hearsay rule); *see State v. Stone*, 122 Ariz. 304, 310, 594 P.2d 558, 564 (App. 1979) ("A minute order of a judgment or order of the superior court is a matter observed and recorded pursuant to duty imposed by law."). And because certified copies of public documents are self-authenticating, no foundation is required for their admission in evidence. Ariz. R. Evid. 902(4) (to establish authenticity of certified copies of public records, extrinsic evidence not required). Moreover, the trial court is authorized, in any event, to take judicial notice of its own files in CR-20012145 and CR-20011874. *See State v. Rushing*, 156 Ariz. 1, 4, 749 P.2d 910, 913 (1988) (finding trial court's own files reliable documentary evidence of defendant's probationary status).

¶10 Acosta acknowledges that CR-20011874 constitutes a valid historical prior felony conviction if the state could prove he had spent more than 184 days in custody on that charge. The state introduced a minute entry that established Acosta had spent at least 269 days in custody for violating probation in CR-20011874. Thus, because the state

presented sufficient evidence that Acosta had spent more than 184 days in custody, the trial court did not abuse its discretion in concluding CR-20011874 is a valid historical prior conviction. *State v. Nash*, 143 Ariz. 392, 403, 694 P.2d 222, 233 (1985) (certified copy of minute entry sufficient to prove prior conviction); *see State v. Robles*, 213 Ariz. 268, ¶ 17, 141 P.3d 748, 753 (App. 2006) (reliable documentary evidence needed to establish prior convictions).

¶11 Acosta contends, however, his confrontation rights were violated when the court admitted that minute entry. In his opening brief, Acosta concedes "[he] did not specifically object on confrontation grounds at the priors trial, but contended below that the trial court's ruling also violated his right to confront witnesses." We do not find any such objection or contention in the transcript of the priors trial. To the extent Acosta believes the issue was preserved for appeal because he raised it in a post-trial motion for reconsideration, we disagree.

¶12 "A defendant who fails to object at trial forfeits the right to obtain appellate relief except in those rare cases that involve 'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The purpose of the "more restrictive fundamental error standard of review" is to encourage timely trial objections, "when the alleged error may still be corrected." *State v. Davis*, 226 Ariz. 97, ¶ 12, 224 P.3d 101, 104 (App. 2010).

¶13 Because Acosta's confrontation argument was not preserved for appeal by a timely objection at the prior-convictions trial, we generally would review for fundamental error. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 7, 185 P.3d 135, 138 (App. 2008) ("When a defendant does not object below to an alleged error, we review solely for fundamental error."). But Acosta does not argue on appeal that the admission of the disposition minute entry constituted fundamental error. His Confrontation Clause argument is therefore waived. *See id.* ¶ 17 (defendant waives right to fundamental error review when defendant fails to argue fundamental error); *see also State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (noting defendant's failure to argue fundamental error).

Petition for Review

¶14 On review, Acosta challenges his conviction for possession of a deadly weapon by a prohibited possessor, arguing the state failed to prove he was a convicted felon.[3] Citing *State v. Hauss*, 140 Ariz. 230, 681 P.2d 382 (1984), Acosta maintains the probation officer's testimony at trial that she had supervised him on probation for a felony conviction was insufficient evidence of a prior felony conviction. He also argues the Clerk's Certificate of No Restoration of Civil Rights Document admitted at trial, although certified as an official court document, was insufficient to prove a prior conviction because it was not a certified copy of a prior conviction.

[3]To support Acosta's conviction for possession of a deadly weapon by a prohibited possessor, the state was required to prove he previously had been convicted of a felony. *See* A.R.S. §§ 13-3102 and 13-3101(A)(6).

¶15 The trial court found Acosta's challenge to his prohibited possessor conviction precluded because it could have been, but was not, raised at the time of his direct appeal.[4] We will not disturb a trial court's ruling on a petition for post-conviction relief unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse of discretion here. Rule 32.2(a)(3), Ariz. R. Crim. P., provides that "[a] defendant shall be precluded from relief under this rule based upon any ground . . . [t]hat has been waived at trial, on appeal, or in any previous collateral proceeding." "A claim is precluded that could have been, but was not, raised in a prior appeal or [petition for post-conviction relief], unless the 'asserted claim is of sufficient constitutional magnitude.'" *State v. Curtis*, 185 Ariz. 112, 115, 912 P.2d 1341, 1344 (App. 1995), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). And here, Acosta does not claim the alleged error was "of sufficient constitutional magnitude" to avoid the preclusive effect his prior appeal had on his current claim. Thus, because the issue was not raised on appeal, it is now precluded.

¶16 Acosta also argues the trial court abused its discretion when it rejected his claim that trial and appellate counsel had been ineffective in failing to challenge the sufficiency of evidence on the prohibited possessor charge at trial and on appeal. He maintains that because the court found that counsel had been ineffective at the first prior-

[4]To the extent Acosta argues he is entitled to challenge the prohibited possessor conviction in the Rule 32 proceeding because appellate counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), raising no arguable issues, Acosta has cited no authority to support that proposition, and we are aware of none.

convictions trial, "[h]ad the trial court not concluded that proving a prior conviction is different at trial for an offense element than proving the prior for enhancement purposes, [the court] necessarily would have reached the conclusion that trial and appellate counsel were ineffective for failing to raise the issue."

¶17 Acosta's ineffective assistance of counsel argument consists of conclusory assertions without any citation to legal authority or the record. Such argument is insufficient for appellate review and, therefore, is waived. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review must comply with rule governing form of appellate briefs and contain "reasons why the petition should be granted" and "specific references to the record"); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on appeal); *State v. French*, 198 Ariz. 119, ¶ 9, 7 P.3d 128, 131 (App. 2000) (summarily rejecting claims not complying with form and content of petitions for review), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). For the same reason, Acosta has failed to demonstrate the trial court abused its discretion in rejecting his argument,[5] and we decline to address it further.

[5]We observe that Acosta has appended certain portions of the trial record to his petition for review. However, he does not refer to them, much less discuss them in any meaningful way, in support of his ineffective assistance claims.

Disposition

¶18 For the reasons stated above, we affirm Acosta's convictions and sentences and, although we grant the petition for review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge